No. 82-794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MILDRED PETERS *et al.*,
Petitioners,
v.
WAYNE STATE UNIVERSITY,
TEACHERS INSURANCE AND ANNUITY ASSOCIATION,
and COLLEGE RETIREMENT EQUITIES FUND

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

LAWRENCE WHITE
(Counsel of Record)
ANN H. FRANKE
1 Dupont Circle, Suite 500
Washington, D.C. 20036
(202) 466-8050
Counsel for the American Association of University Professors

WOODLEY B. OSBORNE
FRIEDMAN & WIRTZ
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-0736
Counsel for the American Federation of Teachers

JOY L. KOLETSKY
1201 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 822-7035
Counsel for the National Education Association

Of Counsel:
RALPH S. SPRITZER
University of Pennsylvania Law School
3400 Chestnut St.
Philadelphia, Pa. 19174

JOHN L. PORTERFIELD, JR.
Yale Law School
New Haven, Ct. 06520

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI*	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

City of Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702 (1978) ..... *passim*

EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978) 6

Furnco Constr. Corp. v. Waters, 433 U.S. 567 (1978) 8, 9

Hannahs v. New York State System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981) 6

Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) 6, 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 8, 9

Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52) 4, 5, 7, 9-10

Peters v. Wayne State University, Nos. 79-1658, 79-1670 & 79-1671 (6th Cir. Oct. 14, 1982) 6, 7, 8

Probe v. State Teachers Retirement System, 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981) 6

Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) 6, 7

Retired Public Employees' Ass'n of California v. California, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262) 4, 5-6

Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980) 6

TABLE OF AUTHORITIES—Continued

Page

Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. Sept. 29, 1982), *petition for cert. filed*, 51 U.S.L.W. —— (U.S. Nov. 9, 1982) (No. 82-791) 3, 4, 5, 6

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 8

Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981) 6

Other Authorities:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980) 4

—§ 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1976) 5

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972) 4

Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U.CHI.L.REV. 505 (1980) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-794

MILDRED PETERS *et al.*,
Petitioners,

v.

WAYNE STATE UNIVERSITY,
TEACHERS INSURANCE AND ANNUITY ASSOCIATION,
and COLLEGE RETIREMENT EQUITIES FUND

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE AMERICAN FEDERATION OF TEACHERS, AND THE NATIONAL EDUCATION ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

This brief is filed, with the consent of all petitioners and respondents, on behalf of the American Association of University Professors ("AAUP"), the American Federation of Teachers ("AFT"), and the National Education Association ("NEA"), *amici curiae*, in support of the petition for certiorari filed November 10, 1982.

As explained more fully below, the *amici* contend that this case is clearly controlled by the Court's decision in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702 (1978). Since the decision of the court of appeals is irreconcilable with *Manhart*, we suggest that it would be appropriate to grant the petition and to reverse summarily the judgment below.

INTEREST OF THE *AMICI*

The *amici curiae* are three of the nation's largest organizations of teaching professionals. Many of their members, like the petitioners in this case, participate in university pension plans managed by respondents Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF"), two closely allied non-profit corporations created to manage a national pension system for the employees of the country's institutions of higher education.

The AAUP is a membership association of 70,000 faculty members and research scholars at American institutions of higher education. Founded in 1915, it is the oldest and largest association of its kind in the country. Approximately eighty percent of its members are male. The AAUP has chapters on 1,300 campuses, and eighty of those chapters engage in collective bargaining on behalf of faculty members. Since 1972, the Wayne State University Chapter of the AAUP has been the certified collective bargaining representative for faculty members at that institution.

The AAUP has long been committed to the elimination of sex discrimination in the higher education community. Even before this Court's decision in *Manhart*, the AAUP formally sought to eradicate widespread discrimination against women in the funding and management of institutional pension plans. Since 1974, the AAUP has repeatedly urged TIAA-CREF, the principal annuity association to which AAUP members belong, to

stop the practice of using sex-based actuarial tables to derive substantially lower retirement benefits for women than for men with equivalent income histories.[1] TIAA-CREF's refusal to adopt a single actuarial table for annuitants of both sexes has generated litigation between TIAA-CREF and the AAUP raising many of the same issues described in the petition in this case.[2]

The American Federation of Teachers (AFL-CIO) is an organization of teachers and faculty members employed in institutions of higher education as well as in elementary and secondary schools. Nearly 80,000 of its 560,000 members are employed in higher education, and AFT locals represent higher education faculty in formal collective bargaining relationships at about 240 institutions across the country. Operating on the national level, as well as through its affiliated locals, the AFT is committed to the establishment and preservation of sex-neutral policies in all aspects of the employment relationships of its members.

The National Education Association is the largest organization of education employees in the United States, with a current membership of approximately 1.7 million persons. A significant number of NEA members are employed in institutions of higher education, and most of these members participate in TIAA-CREF retirement plans. One of the NEA's purposes is to safeguard the constitutional and statutory rights of its members, in-

---

[1] The AAUP's own employees participate in a voluntary retirement plan managed by TIAA-CREF. Because TIAA-CREF refuses to equalize retirement benefits for males and females, the AAUP makes annual direct payments to female retirees sufficient to raise their benefits to the levels enjoyed by male retirees with comparable employment histories.

[2] The AAUP was an appellee in Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. September 29, 1982), *petition for cert. filed*, 51 U.S.L.W. —— (U.S. Nov. 9, 1982) (No. 82-791). The AAUP, with the American Civil Liberties Union, also participated as *amicus curiae* in *Manhart* when the Court decided that case during the 1977 Term.

cluding the right of its female members to be free from sex-based discrimination in pension and annuity plans.

The *amici curiae* are well situated to speak for TIAA-CREF policy-holders with a direct stake in the outcome of this case. The views of the men and women who contribute to the TIAA-CREF pension pool and who will one day receive TIAA-CREF pension benefits may be helpful to the Court in considering and eventually resolving the issues raised in the petition.

REASONS FOR GRANTING THE WRIT

The petitions in this case and *TIAA-CREF v. Spirt*[3] bring to four the number of cases pending before the Court in which retirement plans that pay a different and smaller periodic benefit to female employees than to their male counterparts are challenged under Title VII of the Civil Rights of 1964.[4] Petitions were filed earlier this year in *California v. Retired Public Employees' Association of California*[5] and *Arizona Governing Committee v. Norris*.[6] On October 12, the petition in the latter case was granted.[7]

These four cases are the first pension discrimination cases to reach this Court since *Manhart* was decided. In that case the Court held that Title VII was violated by the establishment of an employer-operated pension plan in which retired employees of both sexes received equivalent periodic retirement benefits although female participants were required to make significantly greater periodic contributions during their worklives:

---

[3] *See* note 2, *supra*.

[4] 42 U.S.C. § 2000e *et seq.* (1976 & Supp. IV 1980), *as amended by* the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

[5] 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262).

[6] 51 U.S.L.W. 3187 (U.S. July 14, 1982) (No. 82-52).

[7] 51 U.S.L.W. 3276 (Oct. 12, 1982).

> The statute makes it unlawful "to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.
>
> • • •
>
> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. . . . Even if the statutory language were less clear, *the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.*[8]

In the years since *Manhart* was decided, TIAA-CREF has continued to use sex-differentiated actuarial tables and, when challenged, has attempted to draw a distinction between the retirement plan at issue in *Manhart*, which required female employees to make larger periodic contributions in order to receive the same periodic benefits as their male counterparts, and its own retirement plan, which exacts the same periodic contribution from males and females but pays females a significantly smaller monthly benefit after retirement. Until last month's decision by the court below, however, every post-*Manhart* decision rejected that distinction.[9] The Second Circuit's recent decision in *Spirt*, another case involving TIAA-CREF retirement benefits, is typical:

---

[8] 435 U.S. at 708, 709 (emphasis added). *See* Civil Rights Act of 1964 § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1976) (making it unlawful for an employer to "classify" employees on the basis of sex).

[9] Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), *petition for cert. granted*, 51 U.S.L.W. 3276 (U.S. Oct. 12, 1982) (No. 82-52); Spirt v. TIAA-CREF, Nos. 79-7715, 79-7737 & 79-7739 (2d Cir. Sept. 29, 1982), *petition for cert. filed*, 51 U.S.L.W. —— (U.S. Nov. 9, 1982) (No. 82-791); Retired

> [W]e can discern no meaningful distinction between the disparate treatment accorded the female employees in *Manhart*, who were required to contribute a larger percentage of their salaries while working in order to receive monthly retirement benefits equal in amount to those received by their male counterparts, and the disparate treatment accorded the female TIAA-CREF participants in this case. . . . In fact, it would seem that if there is any meaningful distinction between the two types of sex-based plans, it is the TIAA-CREF type of unequal benefit plan that is more in conflict with the spirit and purposes of Title VII.[10]

The Sixth Circuit's attempt to resurrect the same distinction conflicts with the reasoning of this Court in *Manhart*. The court below ignored the admonition in *Manhart* to "focus on fairness to individuals rather than fairness to classes," 435 U.S. at 709, and instead equated the aggregate "value of the retirement plan" for women as a class and men as a class.[11] According to the court below, "accepted actuarial practices" offer a "legitimate non-discriminatory reason for treating female and male

---

Public Employees' Ass'n of California v. California, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3212 (U.S. Aug. 14, 1982) (No. 82-262); EEOC v. Colby College, 589 F.2d 1139 (1st Cir. 1978); Probe v. State Teachers Retirement Syste[illegible] 28 Empl. Prac. Dec. (CCH) ¶ 32,602 (C.D. Cal. 1981); Hannahs v. [illegible]w York State Teachers Retirement System, 26 Empl. Prac. Dec. (CCH) ¶ 32,037 (S.D.N.Y. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Shaw v. Int'l Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995 (C.D. Cal. 1980). *Cf.* Henderson v. Oregon, 405 F. Supp. 1271 (D. Ore. 1975) (pre-*Manhart* decision); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, *cert. denied*, 434 U.S. 825 (1977) (decided on constitutional rather than statutory grounds).

[10] Spirt v. TIAA-CREF, *supra* note 2, slip op. at 11-12.

[11] Peters v. Wayne State University, Nos. 79-1658, 79-1670 & 79-1671, slip op. at 6 (6th Cir. Oct. 14, 1982), reprinted in the Appendix to the Petition (hereinafter "Pet. App.") at A-8.

annuitants differently"[12]; the court does not mention, however, that the same actuarial justification for distinguishing between classes of annuitants was considered and rejected in *Manhart*.[13]

The court also erred by holding that male and female employees at Wayne State University "receive equal compensation" under the pension plan now in effect.[14] *Manhart* expressly recognized that pension benefits are "compensation" embraced by Title VII.[15]

---

[12] *Id.*

[13] 435 U.S. at 708-709.

As at least four lower courts have noted, notions of actuarial "fairness" may produce a result that is far from equitable for the vast majority of working women. Although women as a class have a longer life expectancy than men as a class, the difference is attributable to a small fraction of the female population who live especially long and a small fraction of the male population who die especially young. Eighty-four percent of all women and 84 percent of all men have the same life expectancy. For most women, therefore, a smaller monthly pension will generate less money over the course of a lifetime than most men will earn. "As a result, each woman is penalized because a few women live longer and each man benefits because a few men die early." Henderson v. Oregon, 405 F. Supp. 1271, 1275 n. 5 (D. Ore. 1975). *Accord*, Norris v. Arizona Governing Committee, *supra* note 9, 671 F.2d at 332 n. 1; Manhart v. City of Los Angeles, Dep't of Water & Power, 553 F.2d 581, 585 (9th Cir. 1977), *aff'd*, 435 U.S. 702 (1978); Reilly v. Robertson, 266 Ind. 29, 360 N.E.2d 171, 176, *cert. denied*, 434 U.S. 825 (1977).

In sum: If notions of actuarial fairness were germane under Title VII, it is far from clear that equity would compel the use of sex-differentiated actuarial tables. But under *Manhart*, such notions are not germane. The actuarial characteristics of women as a class cannot be invoked as a justification for sex discrimination. "Even a true generalization about a class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." 435 U.S. at 708.

[14] *Peters, supra* note 11, slip op. at 8, Pet. App. A-10.

[15] 435 U.S. at 712 n. 23. If pension benefits for males and females are unequal, then so is "compensation", even if take-home pay is the same.

There is a more fundamental flaw in the Sixth Circuit's decision. The court erroneously relied on *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Furnco Construction Corp. v. Waters*, 433 U.S. 567 (1978), for the proposition that Title VII complainants must "demonstrate at trial that [the employer's] motivation was discriminatory or improper. . . ." [16] These cases, however, are quite beside the mark. They are meant to apply when an employee claims that he or she was fired (or not promoted) because of sex or race, and the employer denies that that was the reason for the adverse action. When there is a dispute over the employer's true motivation in singling out an individual employee for special treatment, *Burdine* and *Furnco* provide a useful evidentiary mechanism for allocating the burden of proof. In pension discrimination cases, however, motivation is not a disputed issue. The TIAA-CREF pension plan, to borrow a phrase used repeatedly in *Manhart*, is "discriminatory on its face." [17] It singles out all women for special treatment because they are women. The question before the court below was whether Title VII permits periodic pension benefits to be computed using a classification scheme based on sex. *Burdine* and *Furnco* do not provide the answer. *Manhart* does.[18]

---

[16] Peters, *supra* note 11, slip op. at 7, Pet. App. A-9.

[17] 435 U.S. at 715, 716. TIAA-CREF defends this discrimination by invoking concepts of actuarial equity. But this is irreconcilable with *Manhart's* emphasis on equal treatment for individuals rather than groups. *See* nn. 11-13, *supra*, and accompanying text. *See also* Brilmayer, Hekeler, Laycock & Sullivan, *Sex Discrimination in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI.L.REV. 505, 508-23 (1980).

[18] The holdings in *Burdine* and *Furnco* follow from McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), decided five years before *Manhart*. Under the analysis first prescribed in *McDonnell Douglas*, proof in support of a disputed claim of disparate treatment is presented to the trial court in three sequential stages. 411 U.S. at 802-804. If, as the lower court apparently believed, the three-

In sum, the decision below is irreconcilable with this Court's decision in *Manhart* and inconsistent with an unbroken line of lower court cases that rely on *Manhart*. In the circumstances, we believe that it would be appropriate to grant the petition and to reverse summarily the judgment below.

The Court's decision to grant certiorari in the *Norris* case [19] underlines the appropriateness of summary reversal here. *Norris* raises issues that are considerably narrower than those in *Manhart* and the other post-*Manhart* cases (including this one). As the petition in *Norris* candidly acknowledges, the facts in that case are "[u]nlike previous cases where the insurance company had a possibly symbiotic relationship with the employer, or the employer took an active role in administering the allegedly discriminatory [pension plan] . . . ." [20] The employer in *Norris* neither contributes to nor supervises the administration of a retirement benefit plan. Here, by contrast, the pension plan provided by Wayne State University and TIAA-CREF is funded through employer and employee contributions and provides annuity benefits only.

The petitioners in *Norris* have gone to considerable lengths to stress the controlling nature of the *Manhart* decision, stating that the statutory question is whether, "under the reasoning of [*Manhart*]," Title VII was violated by a voluntary deferred compensation plan that allowed employees of both sexes to purchase retirement

---

step analysis was meant to be applied in pension discrimination cases, one would expect to find references to *McDonnell Douglas* and *Furnco* in *Manhart*. There are, of course, no such references. So far as we have been able to determine, the decision of the court below marks the first time any federal court has sought to apply the three-step analysis of *McDonnell Douglas* in a pension discrimination case.

[19] *See* notes 6 & 7, *supra*.

[20] *Petition* in No. 82-52, at 8.

benefits on the open market.[21] *Norris* is presented to the Court as an exception to the rule in *Manhart*, not as a challenge to that rule. If *Norris* is decided on the basis of the questions presented by the petitioners—the tenuous relationship between the employer and the insurer and the "open market option" available to participants under that plan—then the decision in *Norris* will not be controlling here.

CONCLUSION

For the reasons set forth herein, the writ of certiorari should be granted and the judgment of the court below should be summarily reversed.

Respectfully submitted,

LAWRENCE WHITE
(Counsel of Record)
ANN H. FRANKE
1 Dupont Circle, Suite 500
Washington, D.C. 20036
(202) 466-8050
Counsel for the American Association of University Professors

WOODLEY B. OSBORNE
FRIEDMAN & WIRTZ
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 887-0736
Counsel for the American Federation of Teachers

JOY L. KOLETSKY
1201 Sixteenth St., N.W.
Washington, D.C. 20036
(202) 822-7035
Counsel for the National Education Association

Of Counsel:
RALPH S. SPRITZER
University of Pennsylvania Law School
3400 Chestnut St.
Philadelphia, Pa. 19174

JOHN L. POTTENGER, JR.
Yale Law School
New Haven, Ct. 06520

November 12, 1982

---

[21] *Id.* at i.